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IN THE

Supreme Court of The United States

October Term, 1975

No. 75-125

RICHARD J. GETTY

Petitioner,

V.

COMMONWEALTH OF KENTUCKY EX REL
KENTUCKY BAR ASSOCIATION

Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

RESPONDENT'S REPLY BRIEF

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PRESS OF KENTUCKY INVESTORS, INC., FRANKFORT, KENTUCKY

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Petitioner's Reply Brief raises new issues which must be answered to assist the Court in its consideration of this case.

1. THE PENDENCY OF TWO OTHER PETITIONS RAISING THE SAME CONSTITUTIONAL ISSUES

Petitioner calls to the Court's attention the cases of *John W. Collis v. Kentucky Bar Association* (No. 75-471) and *Neville Tucker v. Kentucky Bar Association*, which he states will be filed during the last week of September, 1975, allegedly raising substantially similar constitutional challenges to the disciplinary procedures of the Kentucky Court of Appeals. Petitioner requests that action be deferred on this case until all three cases can be reviewed together.

It is respectfully submitted that no good purpose can be

served by delaying a determination on this case in the light of any subsequent cases to be filed. For this Court to set such a policy would naturally delay this Court's business in the future and do substantial damage to the ability of the Kentucky Court of Appeals to effectively discipline the officers of its court. The fact that intermittent effectiveness of the mandate of the Kentucky Court of Appeals has permitted respondent to practice one day and not the next during his process of filing a Petition for Writ of Certiorari has caused considerable confusion at the Kentucky bench and bar. A further delay in rendering justice in this case will contribute to the confusion of the past several months.

It is believed that opposing counsel was unaware that this Court has granted Neville M. Tucker an extension of time to file his Petition for Writ of Certiorari until and including November 10, 1975. The extension was granted on September 19, 1975. To delay consideration of the *Getty* case in order to join it with the *Tucker* matter can serve no useful purpose. The *Tucker* case involved no issue of fact whatsoever. Mr. Tucker failed to file an answer to the initial complaint and failed to file an answer to the formal charge. This case is totally dissimilar from the *Getty* case.

The *Collis* Petition for Writ of Certiorari has been filed. To further delay the Court's decision in this case to join it with the *Tucker* case will result in continued damage to the citizens of the Commonwealth of Kentucky. Upon a review of the opinion of the Court of Appeals of Kentucky appended to the *Collis* Petition for Writ of Certiorari as Appendix A, it will be discovered that Mr. Collis converted his clients' funds to his own use. His continued ability to hold himself out as a practicing attorney is placing the public interest in great peril. It is respectfully called to the Court's attention that at no time during the proceeding in the Kentucky Court of Appeals did Mr. Collis argue that that court should provide it with a due process evidentiary hearing before the Justices or Commissioners of that court. It cannot be argued now on appeal to this Court.

2. CONSTITUTIONAL QUESTIONS

There are no substantial constitutional questions raised in this case. The constitutional questions raised by petitioner are not of nationwide concern. Respondent is unaware of any cases in the past that have raised similar issues before this court from other jurisdictions. Respondent is unaware of any conflicting decisions in other states regarding the constitutional questions raised in this case.

(a) There is No Denial of Due Process Where a Lawyer is Not Given Any Opportunity for a Hearing Before the Board of Governors.

Petitioner states that a 15-man Board of Governors considers disciplinary cases. There are 17 Board members that hear disciplinary cases. Petitioner readily admits he had a full due process hearing before a three-man trial committee, the chairman of which was designated and commissioned by the Chief Justice of the Kentucky Court of Appeals to try the issues in the proceeding. (See Appendix B to Brief for Respondent in Opposition.)

In order for the Court to review the excellent due process procedures incorporated into Rule 3 of the Kentucky Court of Appeals, it is necessary to start at the beginning of the disciplinary process. In petitioner's case, complaints were initiated after a complete investigation of the matters alleged in the charge of unprofessional conduct. Notice was given of the complaints and timely responses were filed. The Inquiry Tribunal reviewed the complaints and responses and determined that probable cause existed to conclude that respondent had been engaged in unprofessional conduct; therefore, charges were filed. Respondent received notice of the charges and filed timely answers thereto. A full due process hearing was held in a "de novo" climate. The advisory trial committee report, the charge and transcript of proceedings before the trial committee were reviewed by the Board of Governors without the presence of counsel on either side. The Board of Governors

had three alternatives: dismiss the charges, issue a private reprimand or recommend public discipline to the Kentucky Court of Appeals. If the first two alternatives had been exercised, the case would have terminated without any detriment to petitioner and the Board's function as a "screening" device would have been utilized. The vital elements of the due process hearing were fresh before the Board of Governors. The Board proceeded to *recommend* to the Kentucky Court of Appeals discipline. At that point, a possible point of detriment to petitioner, the court issued a rule to show cause submitting to petitioner the advisory trial committee report and order of the Board. Petitioner at that point again had an opportunity to file a response to the rule and brief in support thereof. Petitioner exercised that right. After the adverse opinion of the Kentucky Court of Appeals was rendered, petitioner exercised his rights to file a petition for rehearing wherein new issues were presented to the court. In short, Kentucky's disciplinary proceedings are carefully drafted to assure all possible due process to an attorney under charge. At all crucial points in the proceeding notice and an opportunity to be heard are provided on numerous occasions.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through proceedings instituted by the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Kentucky Court of Appeals.

This Court has made clear the strong state interest of state courts in disciplining its members in the recent case of ***Goldfarb v. Virginia State Bar, et al.***, 95 S.Ct. 2004 (1975) at p. 2016, when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' See Sperry v. Florida, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed. 2d 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed.2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

(b) The Absence of a Full Factual Inquiry Before the Justices of the Kentucky Court of Appeals in Person Where the Court Judges all Factual Issues, Does not Deny Due Process.

The aforesaid issue was not argued before the lower court and is, therefore, not properly before this Court; however, the issue will be discussed.

The Kentucky Bar Association, by statute (KRS 30.170) and Rule 3 of the Kentucky Court of Appeals, is an adminis-

trative arm of the court for the purpose of enforcing the standard of conduct for attorneys set by the court and for the purpose of prohibiting the unauthorized practice of law. The court has rightly retained ultimate fact finding and imposing of public discipline to itself under the court's widely recognized inherent power to discipline its officers in the interest of public protection. Kentucky disciplinary actions are original actions by the court in the court. Trial committee hearings are, in effect, hearings by the court. There is no validity to the argument that the impact of the due process hearing is lost by the time the matter reaches the court. Where the ultimate fact finding function is retained by the court, there is certainly no need for a "substantial evidence standard."

The record of this case clearly demonstrates the advisory findings of the trial committee and the Board of Governors were not ignored by the Kentucky Court of Appeals. The court's opinion (Petition, Appendix p.17) clearly recites that all evidence was reviewed. Both the Board and the court agreed with the trial committee's conclusions as to counts of the first charge and found petitioner not guilty. On the second charge, the court found petitioner guilty and gave a detailed analysis of the facts supporting the conclusion. The record is really clear as to petitioner's conduct in the factual context. Petitioner's main objection is that such conduct does not constitute unprofessional conduct. The court found it to be clear misconduct and ordered appropriate discipline. This case clearly rests on an adequate non-federal ground.

The disciplinary proceedings of the Kentucky Court of Appeals are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court Practice*, 3rd Edition (1962).

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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October 3 , 1975

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of October, 1975, I served on Honorable Eugene Gressman, 1828 L Street, N.W., Washington, D.C. 20036, and Honorable Raymond Francis Connell, 326 Main Street, Paris, Kentucky 40361, Attorneys for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

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